Supreme Court, U.S.
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No. 94-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

JUAN R. GONZALEZ, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

PETITION FOR A WRIT OF CERTIORARI

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39 pp

QUESTION PRESENTED

IS A MILITARY DEFENDANT ENTITLED TO THE SAME RIGHT OF EXPERT ASSISTANCE IN PREPARATION OF HIS DEFENSE AS A FEDERAL CIVILIAN DEFENDANT?

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No. 94-

JUAN R. GONZALEZ, Hospital Corpsman First Class
United States Navy,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE
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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Military Appeals, *United States v. Gonzalez*, 39 M.J. 459, (C.M.A. 1994), is reprinted as Appendix A.

The opinion of the United States Navy-Marine Corps Court of Military Review, *United States v. Gonzalez*, No. 88 4472 (N.M.C.M.R. 1992), is reprinted as Appendix B.

JURISDICTION

The United States Court of Military Appeals affirmed the decision of the United States Navy-Marine Corps Court of Military Review on June 23, 1994. Title 28 U.S.C. § 1259(3) provides

jurisdiction in this case and entitles petitioner to seek review of the United States Court of Military Appeals' decision.

STATEMENT OF THE CASE

Petitioner was charged with the premeditated murder of his wife, in violation of Article 118, Uniform Code of Military Justice (U.C.M.J.), 10 U.S.C. § 918. The case was referred to trial with the death penalty authorized. Prior to trial, Petitioner requested that he be provided with a Government-employed investigator to aid in the preparation of his defense.[1] In support of his request, Petitioner argued that the 17 criminal investigators working for the Government refused to inquire into potentially exculpatory evidence which the defense had identified. The request for expert assistance was denied by both the Convening Authority (the officer responsible for Petitioner's prosecution and vested with the authority to grant or deny such requests), and, on review, the military trial judge.

Petitioner was found guilty of the premeditated murder of his wife. Petitioner was sentenced to the mandatory minimum authorized punishment of confinement for life, discharge from the Naval Service with a dishonorable discharge, forfeiture of all pay and allowances, and reduction to the lowest enlisted paygrade.

The Navy-Marine Corps Court of Military Review affirmed the findings and sentence. *United States v. Gonzalez*, No. 88-4472 (N.M.C.M.R. October 26, 1992). In its unpublished opinion, the Navy-Marine Corps Court of Military Review affirmed Petitioner's conviction, *inter alia*, on the ground that Petitioner had failed to demonstrate the necessity of the requested investigator.

On appeal, pursuant to Article 67, U.C.M.J., 10 U.S.C. § 867(a)(3), the Court of Military Appeals affirmed Petitioner's conviction and sentence. *United States v. Gonzalez*, 39 M.J. 459 (C.M.A. 1994). The Court of Military Appeals held that Petitioner had failed to demonstrate the necessity of the requested

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[1] At the time of Petitioner's trial the Naval Investigative Service, the criminal investigative agency of the United States Navy, was willing to provide an investigator to a criminal defendant, on a confidential basis, if ordered to do so.

investigator.

REASONS FOR GRANTING THE WRIT

Military defendants are entitled to the same due process rights as their federal civilian counterparts, absent a legitimate military reason for disparate treatment. Despite this principle, military defendants are denied necessary assistance in circumstances where it would be provided to federal civilian defendants. This disparate treatment cannot be justified by military necessity, is contrary to Congressional intent, and denies military defendants due process.

I. The application of the "necessity test" to requests for expert assistance in the military denies a defendant due process and the fair opportunity to present his defense.

The Due Process Clause of the Fifth Amendment requires that a defendant have access to necessary expert assistance. *See generally Ake v. Oklahoma*, 470 U.S. 68 (1985). In *Ake*, this Court addressed the issue of when a state must provide a criminal defendant with access to a psychiatrist's assistance in the preparation of his case. The Court held that

> [w]hen the defendant is able to make an *ex parte* showing to the trial court that his sanity is likely to be a significant factor in his defense . . . the State must, at a minimum, assure the defendant access to a competent psychiatrist who will . . . assist in evaluation, preparation, and presentation of the defense.

Id. at 82. While this Court has never explicitly expanded the holding in *Ake* beyond requests for psychiatric assistance, it has been applied by the lower federal courts to requests for other types of expert assistance. *See Little v. Armontrout*, 835 F.2d 1240 (8th Cir. 1987); *United States v. Garries*, 22 M.J. 288 (C.M.A. 1986); *c.f. Stephens v. Kemp*, 846 F.2d 642 (11th Cir. 1988); *Ford v. Seabold*, 841 F.2d 677 (6th Cir. 1988); *Moore v. Kemp*, 809 F.2d 702 (11th Cir. 1987), *cert. denied*, 481 U.S. 1054 (1987).

The *Ake* court ruled that when a defendant has demonstrated the "probable value of the . . . assistance sought," and has shown that the expert's testimony is "likely to be a significant factor at trial," then he is entitled to the requested expert assistance. *Ake*, 470 U.S. 74, 78, 82. The Court summarized the test as weighing

> the private interest that will be affected by the action of the State . . . the governmental interest that will be affected if the safeguard is to be provided . . . [and] the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided.

Id. at 78.

Indeed, even before *Ake*, the considerations which subsequently led to that opinion caused this Court to hold that a defendant in a "quasi-criminal" proceeding cannot be denied access to necessary scientific tests if he cannot himself afford them. *Little v. Streater*, 452 U.S. 1 (1981) (cited in *Ake*, 470 U.S. at 78). In *Ake*, this Court summarized its approach to the issue of access to expert assistance by stating that "[m]eaningful access to justice has been the consistent theme of these cases." *Ake*, 470 U.S. at 78.

The military courts have acknowledged that *Ake* and the Due Process Clause of the Fifth Amendment require that a military defendant be provided with necessary expert assistance. *Garries*, 22 M.J. at 290-91. Such application of *Ake* to the military is consistent with this Court's holding that, absent circumstances of a uniquely military nature, the Due Process Clause provides the same protection to servicemembers as it does to civilians. *See Weiss v. United States*, 114 S. Ct. 752, 760-61 (1994), and cases cited therein. The way in which the *Garries* necessity test is applied to requests for expert assistance in the military, however, is substantially different from how it is applied in the federal civilian system, and results in most case in the denial of the right to necessary expert assistance, and the denial of due process.

In the military system, *Garries* and Rule for Courts-Martial

(R.C.M.) 703(d), Manual for Courts-Martial, 1984, establishes the procedures for obtaining Government-funded expert assistance. R.C.M. 703(d) requires that the defense first submit a request for expert assistance to the convening authority, explaining why the requested expert is necessary. If the convening authority denies the request, it may be renewed before a military judge, who will also look for a showing of necessity. R.C.M. 703(d); *Garries*.

Although both the military and civilian federal courts apply a necessity test, the test in the military system, unlike the *Ake* test, does not focus on the probable value of the requested expert assistance, but instead requires that a defendant conclusively prove that the expert's testimony will be a significant factor. Thus, the test has proven to be nearly impossible to satisfy. *United States v. Robinson*, 39 M.J. 88 (C.M.A. 1994); *United States v. Metcalf*, 34 M.J. 1056 (A.F.C.M.R. 1992), *petition granted*, 40 M.J. 35 (C.M.A. 1994); *United States v. Allen*, 31 M.J. 572 (N.M.C.M.R. 1990), *aff'd*, 33 M.J. 209 (C.M.A. 1991), *cert. denied*, 112 S. Ct. 1473 (1992); *United States v. Mann*, 30 M.J. 639 (N.M.C.M.R. 1990), *petition denied*, 32 M.J. 45 (1990); *United States v. Tornowski*, 29 M.J. 578 (A.F.C.M.R. 1989); *United States v. Kinsler*, 24 M.J. 855 (A.C.M.R. 1987), *pet denied*, 27 M.J. 21 (1988). A showing of what the defense has reason to believe will be produced is rarely enough. *Gonzalez*, 39 M.J. 459; *Robinson*, 39 M.J. 88; *United States v. Tharpe*, 38 M.J. 8 (C.M.A. 1994); *Metcalf*, 34 M.J. 1056; *Allen*, 31 M.J. 572; *Mann*, 30 M.J. 639; *Tornowski*, 29 M.J. 578; *Kinsler*, 24 M.J. 855.

In Petitioner's case the application of the *Ake* necessity test would have resulted in the granting of Petitioner's request. The private interest which was in question was clear -- Petitioner's freedom, and perhaps his life. Similarly, the Governmental interest that would be affected was also clear, and fairly insignificant -- the cost of one more investigator, in a case where the prosecution was already employing at least 17 investigators. Or, on a wider scope, the cost to the Government would be the limited financial burden of providing defense investigators in those few cases where a defendant successfully shows necessity. *See Ake*, 105 S.Ct. at 1094. Further, both the probable value of the requested expert, and the risk of an erroneous deprivation of Petitioner's life and liberty if the expert were denied, were quite significant. Petitioner

identified several potentially exculpatory lines of inquiry which the Government investigators knew about, but refused to pursue. Thus, whole areas of potentially exculpatory evidence were not investigated because the request was denied. *Gonzalez*, 39 M.J. at 460.

The issues pointed to by Petitioner in support of his request included the question of whether the victim was seen after the time that the Government claimed she died. Evidence indicated that the victim died sometime during a 72 hour period, App. B at 8a, yet Petitioner's presence was unaccounted for during only four of those 72-hours, and the Government's case absolutely required the victim to have died during those four hours. Two other vital questions left unanswered by the Government investigation, and pointed to by Petitioner, were who supplied the significant quantities of codeine and cocaine found in the victim's body, and who was with her when she ingested them? *Gonzalez*, 39 M.J. at 460. These matters were of overwhelming significance, because the drugs were apparently ingested after the time during which the Government's case required her to have been dead, and the victim's lover was a known drug dealer. *Id.* at 460; App. B at 12a. Additionally, there was the question of why, prior to being murdered by being shot with a crossbow, the victim and her lover had gone to a sporting goods store looking for crossbow bolts. *Gonzalez*, 39 M.J. at 460. The Government investigators never even questioned the owner of the sporting goods store, as they never questioned the local national who found the victim's body. Finally, there was evidence that the murder might have occurred in the course of the victim being robbed, yet the Government investigators refused to investigate whether there were any witnesses to, or persons knowledgeable of, the apparent robbery.

An investigative expert working for the defense would have questioned the several potential witnesses known to the Government, but not questioned by the Government investigators, who may have had information regarding the murder, the robbery, or the drugs. The Government's case was built on circumstantial evidence, all of which absolutely required that the above questions be answered in certain ways. Correct answers to these questions were necessary before appellant could receive a fair trial. The Government investigators, however, were not looking for these

answers, and refused to look into any of the areas identified by Petitioner as being possible leads towards exculpatory evidence. Petitioner's defense attorneys were incapable of conducting such an investigation themselves because they were untrained in the area of criminal investigation, were unfamiliar with the local criminal culture, and did not speak Spanish, the local language.[2] Consequently, the only way that the potentially exculpatory information identified by Petitioner was going to be investigated was if Petitioner was provided with the services of an investigator.

Thus, since "a fair trial in a fair tribunal is a basic requirement of due process," *Weiss*, 114 S. Ct. at 761 (citation omitted), and since the investigation into these areas was necessary for a fair trial, petitioner was entitled to the requested assistance. The Due Process Clause and *Ake* required that Petitioner's request for assistance be granted.

This showing of necessity, however, was found to be insufficient by the lower courts. Instead of being satisfied that Petitioner had shown the probable value of the requested assistance, the courts below held that Petitioner should have provided conclusive proof, prior to the investigation, that the investigator would discover exculpatory evidence. *See Gonzalez*, 39 M.J. at 460; App. B at 10a-12a. Specifically, the Court of Military Appeals stated that the *Garries* necessity test applied, then quoted, apparently with approval, the trial judge's conclusion that "the defense sought 'a broad generalized investigation' without any evidence that particular evidence existed." (emphasis added). *Gonzalez*, 39 M.J. at 460. Under the test used by the court, in order for Petitioner to show necessity, he must show what the results of the requested expert assistance will be, before that assistance is provided. This is a much stricter test than *Ake*, and as demonstrated by its application in Petitioner's case it is almost impossible to satisfy. The obvious problem with such a test is that Petitioner was in no position to produce conclusive proof that particular evidence existed without the assistance of the requested investigator. Just as the Government needed 17 investigators to work on its case, Petitioner needed investigative assistance as well.

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[2] Both the murder and Petitioner's trial occurred in Rota, Spain.

Unfortunately, however, under the military courts' application of the necessity test, Petitioner needed the expert assistance to be able to make a showing that he needed the assistance. Such a circular test is something which only a character out of CATCH-22 should feel comfortable with.

Essentially, the *Garries* necessity test has made a showing of necessity an almost insurmountable obstacle to obtaining investigatory assistance. This split in the application of the necessity test between the civilian and military federal courts has resulted in disparate treatment between civilian and military defendants. Such disparate treatment denies military defendants due process.

Further, even if the different test applied in the military is not almost impossible to satisfy, it is at best substantially more difficult to satisfy than *Ake*. There is, however, no reason for there to be a different test in the military in the first place. As this Court has held in the past, the only time that a military defendant is not entitled to the same due process rights as a civilian is when "the delicate test of balancing the rights of servicemembers against the needs of the military . . . " shows that different treatment is necessary. *Weiss*, 114 S. Ct. at 761. No such "needs of the military" exist in Petitioner's case. The right to expert assistance at trial does not impinge the military's ability to maintain good order and discipline, nor does it adversely impact morale.[3] Providing such assistance, after an *Ake*-style showing of necessity, would not inhibit the military mission, nor would it be unreasonably burdensome.[4]

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[3] If the reason for the government's opposition to Petitioner's request was merely cost and administrative convenience, as it appears to have been, that reason cannot justify such disparate treatment. *C.f. Frontiero v. Richardson*, 411 U.S. 677 (1973) (administrative convenience insufficient to justify gender-based discrimination in determination of military dependency status).

[4] Indeed, the government cannot argue that providing Petitioner the requested expert would have been overly burdensome, because at trial Petitioner was informed that the Naval Investigative Service would willingly provide him with a confidential investigative expert, if ordered

Indeed, if Petitioner's case shows anything it shows why there usually will not be a valid military reason for a different test. Petitioner was not stationed in a remote location, but rather, like the majority of servicemembers, was stationed at a large base. Petitioner, in fact, was stationed at one of the largest naval bases in Europe. The crime and all of the pretrial and trial procedures took place during peacetime, so there was no military need for a particularly rapid investigation or trial. Finally, there was obviously no shortage of trained investigators available, since the Government used at least 17 to prepare its case.

The *Ake* test is the due process "floor". By definition any stricter test provides something less than due process, and can be justified only if there is a valid military need for a different test. In Petitioner's case, there was no such valid need. Given that "men and women of the Armed Forces do not leave constitutional safeguards and judicial protection behind when they enter military service," *Weiss*, 114 S. Ct. at 769 (Ginsburg, J., concurring), Petitioner should have had the same right to expert assistance that a federal civilian defendant would have had. By applying a more difficult test than *Ake*, the lower courts denied Petitioner due process.

II. The split between the federal civilian and military courts over the standard to be applied to requests for expert assistance violates Congressional intent that military and federal civilian defendants be treated similarly when possible.

Congress intended that the military criminal system operate similarly to that of the federal civilian system whenever possible. As stated in Article 36, U.C.M.J., 10 U.S.C. § 836, Congress provided that

> [p]retrial, trial, and post-trial procedures . . .

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to do so, and Petitioner was even told the name of the expert who would be provided.

> may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.

Further, Congress directed in Article 46, U.C.M.J., 10 U.S.C. § 846, that "[p]rocess issued in court-martial cases . . . to compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue . . . ." As this Court recently acknowledged, Congress has explicitly manifested its intent in this regard. *See Weiss*, 114 S. Ct. at 762 ("Congress has taken affirmative steps to make the system of military justice more like the American system of civilian justice").

A criminal defendant in the federal courts is afforded the opportunity to request and to obtain investigative assistance pursuant to the Criminal Justice Act (the CJA), 18 U.S.C. § 3006A (e). Similarly, a military defendant may obtain expert assistance pursuant to R.C.M. 703(d). By enacting similar provisions for the obtaining of expert assistance, Congress indicated its desire that military and federal civilian defendants have equal access to necessary expert assistance.

Further, the Court of Military Appeals has tacitly acknowledged that the same standard should apply. That court has stated that even though the CJA does not apply to the military, the federal courts' application of § 3006A (e) to requests by civilians is useful guidance in applying R.C.M. 703 to requests in the military. *Garries*, 22 M.J. at 290. In practice, however, the lower court's acknowledgment of the similarities between these two provisions has not translated into a similar standard of review of requests for expert assistance. Indeed, the *Garries* necessity test has proven to be almost impossible to satisfy.

The standard for evaluating necessity in the federal system, on the other hand, has been more liberally applied. *Allen*, 31 M.J. at 623. In the federal system, the defendant must show only that there is a reasonable probability that the expert

assistance will be useful in preparing or presenting the defense. *See United States v. Patterson*, 724 F.2d 1128 (5th Cir. 1984); *Williams v. Martin*, 618 F.2d 1021 (4th Cir. 1980); *United States v. Durant*, 545 F.2d 823 (2d Cir. 1976); *United States v. Bass*, 477 F.2d 723 (9th Cir. 1973); *United States v. Theriault*, 440 F.2d 713 (5th Cir. 1971), *appeal after remand*, 474 F.2d 359 (5th Cir. 1973), *cert. denied*, 411 U.S. 984 (1973); *United States v. Schultz*, 431 F.2d 907 (8th Cir. 1970), *appeal after retrial*, 431 F.2d 907 (8th Cir. 1970), *cert. denied*, 416 U.S. 988 (1974). Defendants in federal courts are not required to detail the results of the requested assistance prior to that assistance being made available. Federal courts do not apply the necessity test the same way that it is applied in the military. Therefore, federal civilian defendants do not face the insurmountable obstacle presented to military defendants.

As was intended by Congress, there are similar rules for providing both military and civilian federal defendants with expert or investigatory assistance. However, the manner in which these rules are applied in each system is very different.[5] This difference cannot be justified by military necessity. There is nothing about the needs of the military which require that the test for expert assistance be applied so much more stringently to military defendants then it is to federal civilian defendants.

The disparate application of the necessity test between the military and the federal courts results from the split between the jurisdictions over the application of this fundamental right to present a defense. However, "[a] member of the Armed Forces is entitled to equal justice under law . . . as written in the Constitution." *Weiss*, 114 S. Ct. 769 (Ginsburg, J., concurring). As this split cannot be justified by military necessity, and is contrary to Congressional intent that all federal defendants be

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[5] This inconsistency is further highlighted by the manner in which such requests are made. Due process requires that such requests in the federal system be made by *ex parte* motion. *Ake*, 470 U.S. 1096; 18 U.S.C. 3006(A) (e). In contrast, the court below has stated that, except in the most unusual situation, such motions in the military must be made in open court, so as not to allow the defense an "undue advantage". *Garries*, 22 M.J. 291.

treated similarly when possible, military defendants are entitled to the same right of expert assistance in the preparation of their defense as are federal civilian defendants.

CONCLUSION

The manner in which the military applies the necessity test to defense requests for expert assistance presents a serious constitutional issue: is a military defendant entitled to the same right to expert assistance in the preparation of his defense as is a federal civilian defendant? This issue strikes at the heart of the military justice system's integrity. Accordingly, the Court should issue a writ of certiorari.

Respectfully submitted,

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September 21, 1994

APPENDIX A

U.S. COURT OF MILITARY APPEALS

No. 93-0343

NMCM 88 4472

UNITED STATES, *Appellee,*

v.

JUAN R. GONZALEZ, *Appellant.*

Argued March 17, 1994
Decided June 23, 1994

For Appellant: *Lieutenant Philip L. Sundel,* JAGC, USNR (argued); *Ruth G. Finn* (on brief).

For Appellee: *Captain A. Diaz,* USMC (argued); *Colonel T.G. Hess,* USMC, *Commander S.A. Stallings,* JAGC, USN, *Major Laura L. Scudder,* USMC (on brief).

Opinion of the Court

CRAWFORD, Judge:

[1] Appellant was found guilty of premeditated murder,[1] in violation of Article 118, Uniform code of Military Justice, 10

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[1]The GCMO (No. 4-88) erroneously states the offense as unpremeditated murder.

USC § 918, and sentenced to confinement for life,[2] total forfeitures, reduction to the lowest enlisted grade, and a dishonorable discharge. The convening authority approved the sentence. The Court of Military Review affirmed the findings and sentence. We granted review on the following issue, 38 MJ 190.

> WHETHER THE NAVY-MARINE CORPS COURT OF MILITARY REVIEW MISAPPLIED THE *GARRIES* TEST WHEN IT HELD THAT THE MILITARY JUDGE CORRECTLY DENIED APPELLANT'S REQUEST FOR AN INDEPENDENT INVESTIGATOR.

We hold the Court of Military Review did not misapply *United States v. Garries*, 22 MJ 288 (CMA), *cert. denied*, 479 U.S. 985, 107 S.Ct. 575, 93 L.Ed.2d 578 (1986), in holding that appellant had not established the necessity for appointment of an independent Naval Investigative Service investigator.

FACTS

Four days after appellant's wife's disappearance, her nude and partially decomposed body was found in a drainage ditch in Spain. She had two puncture wounds in the chest and sever bruises on the left side of her face.

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[2]The military judge instructed that "the required concurrence ... is two-thirds or six members for any sentence other than the sentence to death." (R. 1724.) He later instructed that "[i]f reconsideration is required you must adhere to all of my original sentencing instructions to include the two-thirds concurrence required for a sentence other than death...." (R. 1734.) In *Garrett v. Lowe*, 39 M.J. 293 (1994), we held that a three-fourths vote is required in order to impose the life sentence, even though it is mandatory. Accordingly, the above-quoted instructions were erroneous. However, there were eight members voting (R. 1734), and two-thirds or three-fourths of that number would be six. Since the judge specifically told the members that six of them had to concur in "any sentence other than the sentence to death," there is no possibility of prejudice. Art. 59(a), Uniform Code of Military Justice, 10 USC § 859(a).

An autopsy revealed that she had died of two chest wounds from a high velocity projectile, such as a crossbow. These wounds were inflicted after she had been knocked unconscious. At trial, defense counsel requested investigative assistance for the following: To explore defense theories surrounding the death of appellant's wife and to go into the Spanish community where the victim was found because trial could not speak Spanish. The defense theory was that the victim had been involved with the Spanish criminal drug element and had been robbed and killed by those criminals. The toxicology reports on the victim indicated a presence of significant quantities of codeine and cocaine in her system; no jewelry, money, or passport were found on her person, though appellant was the only source of information that she had such items with her when she left their home. CMR unpub. op. at 3.

The questions the investigator would explore were as follows: First, whether the victim was seen after the time the Government claimed she died; second, who supplied the significant quantity of codeine and cocaine found in the victim's body; third, who was with her when she ingested the codeine and cocaine; fourth, whether any of the Spanish Nationals who frequented the bars where the victim was known to be a regular had knowledge of her murder, robbery, or drug usage; and fifth, whether there was any connection between the crossbow arrows which allegedly killed the victim and the sporting goods shop where the victim went with her lover looking for crossbow arrows. Final Brief at 9-11.

The military judge denied the defense motion. He concluded that the defense sought "a broad generalized investigation" without any indication that particular evidence existed; therefore, the defense had not shown "necessity" for the requested assistance. At the same time, he recognized the practical difficulties facing the defense in seeking to develop its theory: Defense counsel lacked investigative training and expertise and could not speak Spanish. Accordingly, he provided the defense with an interpreter under an "order of confidentiality," and it was clearly understood by all that the defense "would be re-

petitioning the court" for an independent investigator if the defense were to "discover certain information or evidence" that would show necessity for such assistance.

Evidence of appellant's guilt was very strong. On the same day his wife turned up missing, his girlfriend was seen wearing a ring earlier worn by his wife. Additionally, appellant had made a number of inculpatory statements.[3]

DISCUSSION

[2] In *United States v. Garries, supra*, this Court held that, upon a showing of necessity for services, the accused is entitled to employment of an expert. The Court cited *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), and RCM 703(d), Manual for Courts-Martial, United States, 1984. We have not drawn a distinction between a government or non-government investigator or expert. *United States v. Robinson*, 39 MJ 88 (CMA 1994) (accused did not satisfy *Garries* test in requesting an expert to perform secretor tests); *United States v. Burnette*, 29 MJ 473 (CMA) (military judge did not abuse discretion when refusing to order the Government to provide requested civilian experts--accused specifically rejected assistance of any government experts), *cert. denied*, 498 U.S. 821, 111 S.Ct. 70, 112 L.Ed.2d 43 (1990); *United States v. Toledo*, 25 MJ 270 (CMA 1987) (accused has no right to

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[3]As the Court of Military Review stated:

> Some of appellant's inculpatory statements include: telling another sailor that a crossbow was missing from his home prior to his wife's body being discovered; when told his wife died of puncture wounds, stating that he knew something like this would happen when his wife and Yuri took the crossbow; telling another sailor that she (his wife) died quickly, that using a crossbow at 4 feet the arrow would not go through her, that they couldn't get him without the crossbow, and that he had to do it because his wife was leaving him.

Unpub. op. at 2 n.4.

specific government expert), *cert. denied,* 488 U.S. 889, 109 S.Ct. 220, 102 L.Ed.2d 211 (1989). *Cf. Half-Acre v. Chambers,* 5 MJ 1099 (CMA 1976) (ordered government transportation for defense counsel to conduct investigation). In applying *Garries* the Court of Military Review applied the three-step procedure set forth in *United States v. Allen,* 31 MJ 209 (CMA 1991), *cert. denied,* ___ U.S. ___, 112 S.Ct. 1473, 117 L.Ed.2d 617 (1992), as follows:

> There are three aspects to showing necessity. First, why the expert assistance is needed. Second, what would the expert assistance accomplish for the accused. Third, why is the defense counsel unable to gather and present the evidence that the expert assistant would be able to develop.

As we said earlier (at (*460*)), one of the main concerns raised by the defense was that both defense counsel were not investigators and did not speak Spanish. The judge resolved this by ordering that an interpreter be provided to the defense under an order of confidentially. This interpreter could have been used to interview several potential witnesses, including the man who discovered the body, the Spanish authorities present at the scene, and the employees at the bar where the victim had been seen drinking prior to her disappearance. However, there is no indication that the defense ever used the interpreter for any of these reasons. The Court of Military Review noted that "they certainly did not use the interpreter to interview anyone in the Spanish community in an attempt to lay a foundation to renew the request of an investigator." Unpub. op. at 4.

In essence, the defense was given the tools potentially to gather evidence to lay a foundation for the necessity of an independent investigator. *See United States v. Kelly,* 39 MJ 235 (CMA 1994). However, not only did the defense not renew its motion based upon the evidence counsel had discovered, but they also did not effectively use the interpreter to build its case for an independent investigator.

The decision of the United States Navy-Marine Corps Court of Military Review is affirmed.

Chief Judge SULLIVAN and Judges COX, GIERKE, and WISS concur.

APPENDIX B

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
200 STOVALL STREET
ALEXANDRIA VA 22332-2400

IN THE U.S. NAVY-MARINE CORPS
COURT OF MILITARY REVIEW
BEFORE

KENT A WILLEVER R.A. STRICKLAND JAMES E. ORR

UNITED STATES

V.

Juan R. GONZALEZ, 446 44 4023
Hospital Corpsman First Class (E-6), U.S. Navy

NMCM 88 4472 Decided 26 October 1992

Sentence adjudged 15 June 1988. Military Judge: James J. Stonier. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, U.S. Naval Activities Spain, FPO New York 09540-1000.

RUTH G. FINN, Esq., Civilian Defense Counsel
LT NICHOLAS FITZGERALD, JAGC, USNR, Appellate Defense Counsel
LT JACOB R. WALKER, JAGC, USNR, Appellate Defense Counsel
LT NANETTE M. DERENZI, JAGC, USNR, Appellate Defense Counsel
LT MARY ANNE RAZIM-FITZSIMONS, JAGC, USNR, Appellate Defense Counsel
LtCol J.S. UBERMAN, USMC, Appellate Government Counsel
LCDR J. RICHARD CHEMA, JAGC, USN, Appellate

Government Counsel

STRICKLAND, Senior Judge:

This is an appeal from the appellant's conviction by officer and enlisted members for the premeditated murder of his wife.[1] Appellant was sentenced, *inter alia*, to life imprisonment. We have jurisdiction pursuant to Article 66(b)(1), Uniform Code of Military Justice (UCMJ). Numerous errors are presented on appeal; however, the principal issues are: whether the military judge erred in denying the defense request for an independent investigator; whether the Government proved the appellant's guilt beyond a reasonable doubt; and whether the appellant was denied effective assistance of counsel. We conclude that no reversible error occurred, and we affirm.

I

Appellant and his wife (the victim) were both assigned to the Naval Hospital, Rota, Spain. They lived in a rented home off the base. On the morning of 10 April 1987, the victim failed to appear for work. On 13 April 1987, the victim's naked body was found under a bridge in the Spanish countryside. Articles of the victim's clothing were found in close proximity of the body. An autopsy revealed that the victim had died as a result of two puncture wounds which perforated the sternum. In addition, there were several hematomas to the left side of the victim's face. Toxicology results indicated a presence of some amount of both cocaine and codeine in the victim's system. Experts opined that the date of death was anywhere from 9 to 11 April.

Appellant told authorities conflicting accounts as to when, and under what circumstances, he last saw his wife on the evening

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[1]It is questionable whether the appellant and the victim were legally married since the victim may not have been divorced from her previous husband. Nevertheless, we will refer to them as married in this opinion.

of 9 April. The version which he adopted last, ostensibly the one most consistent with all of the evidence, and upon which appellant relied, indicated that he had returned home and found his wife to be absent. She returned later in the evening after spending several hours "bar hopping" with a friend named Yuri.[2] An argument ensued during which the appellant claimed his wife threw a dog collar at him and attempted to hit him.[3] Appellant asserted that he restrained her by grabbing her hands and at some point took a swing at her but missed and hit his hand on the wall causing an injury. He denied ever striking his wife. Thereafter, appellant's wife left, and he claimed he never saw her again.

Appellant's girlfriend saw him at 2100 on the evening of 9 April when she stopped by his house. Appellant met her at the door and indicated it was not a good time for her to visit. She returned home and next saw the appellant at 0200 on the 10th of April when he showed up ar her house. At that time the appellant had a severely bruised and swelling right hand. They returned to appellant's home and sometime thereafter the appellant gave her a silver ring containing three diamonds. A witness had seen the victim wearing this ring the previous morning. During the next month, the appellant exhibited some unusual behavior (nervous, upset, shaking, crying, and unkept)

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[2]Both the appellant and his wife were involved in intimate relationships outside their marriage and each was aware of the other's relationships.

[3]There was evidence that despite the appellant's intimate relationship with his girlfriend, he did not approve of his wife's relationship with Yuri. There was also evidence of further conflict between the appellant and the victim. On the morning of 9 April, the appellant had attended an "XO's Screening Mast" as the command was contemplating bringing charges against the appellant arising out of the fact that his wife was not legally divorced from her prior husband. The appellant had also expressed concern to several individuals that his wife was ruining his career.

and made several inculpatory statements.[4]

II

Prior to trial, the appellant made a motion requesting the military judge order the Government to provide independent investigative assistance and an interpreter to the defense team under an order of confidentiality. The military judge denied the motion of the basis that the defense had failed to show the necessity for an independent investigator. the judge did, however, find that the defense had met its burden with respect to a translator and ordered that a translator/interpreter be provided to the defense and that the work product be protected by confidentiality. Appellant asserts on appeal that the judge erred as a matter of law in denying the request for an independent investigator.[5] The standard for review is whether the trial judge abused his discretion in denying this motion. *See United States v. Garries*, 22 MJ 288 (C.M.A. 1986), *cert. denied*, 479 U.S. 985 (1987).

Military due process entitles an accused to expert or investigative assistance when necessary for an adequate defense. *Garries*. The burden of establishing the necessity of expert assistance rests with the accused. *United States v. Allen*, 31 MJ 572 (N.M.C.M.R. 1990). A three step procedure to show necessity was established in *Garries* and reiterated by this Court

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[4]Some of appellant's inculpatory statements include: telling another sailor that a crossbow was missing from his home prior to his wife's body being discovered; when told his wife died of puncture wounds, stating that he knew something like this would happen when his wife and Yuri took the crossbow; telling another sailor that she (his wife) died quickly, that using a crossbow at 4 feet the arrow would not go through her, that they couldn't get him without the crossbow, and that he had to do it because his wife was leaving him.

[5]Appellant also asserts as an assignment of error that the convening authority erred in failing to provide him with the identical expert assistance. The convening authority's denial of this request was properly renewed before the military judge pursuant to Rule for Courts-Martial 703(d). We will test the military judge's ruling for an abuse of discretion, and we need not address the propriety of the convening authority's action in this regard.

in *Allen*. The three steps are: "First, why [is] the expert assistance [] needed. second, what would the expert assistance accomplish for the accused. Third, why is the defense counsel unable to gather and present the evidence that the expert assistant would be able to develop." *Id.* at 623.

In this case, the appellant's request for an independent investigative assistant was predicated on what can be described as the "defense theory" of the case. This theory incorporated the following factors: the victim and Yuri went to several Spanish bars on the night of 9 April; the victim was not seen after 9 April; the autopsy revealed the presence of significant quantities of cocaine and codeine in the victim's body; Yuri professed no knowledge of these drugs; jewelry, money, and passport were not found with the body which suggested the victim was robbed[6]; and, neither the Spanish national who discovered the body nor any Spanish nationals in the bars were interviewed by the Naval Investigative Service (NIS). The "defense theory", then, was that the victim was involved with the criminal element in the Spanish community, it was this element that supplied the victim with drugs, and that once under the influence of these drugs the victim was robbed and murdered by this same criminal element or some other members of the Spanish community. In his request, the appellant stressed that his counsel did not speak Spanish and were not trained investigators so that they were thus unable to conduct any of the necessary interviews.

Appellant's theory can be stated in another way: "I did not commit this crime, therefore someone else committed the crime. I need investigative assistance to find the real culprit." In essence, appellant is asserting that he did not commit the offense because someone else did it, and someone else committed the crime because he did not. A logical analysis of these

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[6]The only information which indicates that the victim had money, jewelry, and a passport with he was supplied by appellant to the authorities. This might be construed as a self-serving statement if appellant wished to suggest to the authorities that his wife was murdered during a robbery.

conclusions, standing alone without further support, reveals the material fallacy of arguing in a circle. This theory fares no better utilizing a legal analysis than employing a logical analysis.

To determine whether the appellant met the burden of establishing necessity we apply the three step test of *Garries* to the rationale asserted by the appellant in his request. The reason why he needed investigative assistance was to find the real killer. This is straight forward and was adequately articulated by the appellant. The next two steps, however, are not as easily resolved. In response to what the assistance would accomplish, the appellant would assert that the assistance would identify the actual murderer or would at least cast doubt on his own guilt. However, step two of the analysis is not satisfied if these conclusions have no basis in fact and are simply the result of speculation. The appellant offered no facts, evidence, or proffers to support the fact that an investigator would accomplish anything. To the contrary, indications were that nothing would be accomplished since there was evidence that the victim was not seen after 9 April because experts opined that this was the date of her death. There already was evidence that the drugs found in the victim's body might have come from Yuri, despite Yuri's protestations to the contrary, since the appellant had made a statement to the Spanish Guardia Civil that Yuri used drugs and occasionally offered the appellant drugs. The only facts to suggest even the possibility that the victim might have been robbed were uncorroborated statements of the appellant concerning items he claimed his wife took from the house the last time he saw her. The wounds which caused the victim's death were consistent with those which might be expected from a crossbow, and the crossbow which was kept in the appellant's garage was missing. In summary, there were no facts to suggest that an investigator might uncover anything to support the defense theory. Whether the investigator would accomplish anything was simply speculation.

Finally, we analyze the third step as to why the defense counsel was unable to gather and present evidence that the

investigator would be able to develop. Appellant asserts that neither of his counsel spoke Spanish nor were they trained investigators. The military judge resolved the first of these points by ordering that an interpreter be provided to the defense under an order of confidentiality. Thus, the only remaining question is whether the counsel and the interpreter could gather the same evidence as an investigator. Certainly, they could have interviewed the man who discovered the body, the Spanish authorities who were present at the scene of the body, or the employees of the bars in which the victim had been drinking. The military judge informed the appellant that he could renew his request for an investigator if a factual basis could be developed employing the interpreter. There is no indication, however, that the defense ever utilized this interpreter for any reason; they certainly did not use the interpreter to interview anyone in the Spanish community in an attempt to lay a foundation to renew the request for an investigator. As the Court of Military Appeals stated in *United States v. Burnette*, 29 MJ 473 (C.M.A. 1990), "As long as the Government was willing to provide competent assistance at government expense--which the defense preemptively rejected--the Government's burden was satisfied." *Id.* at 476. The military judge in this case provided an interpreter to assist the defense in an effort to find a factual basis to support the necessity for investigative assistance. The failure of the defense to use this interpreter resulted in satisfying the Government's burden as to the only assistance for which necessity had been demonstrated at that point in time. This failure also causes the appellant to be unable to show why his counsel and the interpreter could not have developed the same information as an investigator.

We conclude that the appellant failed to satisfy steps two and three and thus failed to demonstrate the necessity for the requested investigator. Consequently, we hold that the military judge did not abuse his discretion in denying the appellant's

request for an investigator.[7]

III

The appellant asserts that the Government failed to prove his guilt to premeditated murder beyond a reasonable doubt. The standard of review for factual sufficiency is whether this Court is convinced of the appellant's guilt beyond a reasonable doubt, giving due deference to the fact that we did not personally observe the witnesses. *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). The standard of review for legal sufficiency is whether a reasonable fact finder could have found all of the essential elements beyond a reasonable doubt considering the evidence in the light of most favorable to the prosecution. *Jackson v. Virginia*, 443 U.S. 307 (1979).

In support of his argument, appellant cites inconsistencies and ambiguities in the prosecutor's theory of the case at trial and implies that the defense theory offered at trial is more believable. For example, appellant refers to inconsistencies among the experts as to the date of death, ambiguity as to the identity of the murder weapon, the lack of any physical evidence in appellant's car or home linking him to the crime, the inconsistent testimony regarding the pattern of lividity marks on the back of the victim and whether they came for a pallet in the appellant's back yard, and the victim's relationship with another man and whether he was the actual killer.

We are not bound in our determination of the factual and legal sufficiency of the evidence by the theories advanced by either the trial counsel or the defense counsel at trial or by counsel on appeal. Likewise, the members were not bound to accept either of these theories in order to find appellant guilty.

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[7]To hold otherwise would place an undue hardship and financial burden on the Government since the Government would be required to provide an independent investigator simply on the basis of the accused professing his or her innocence of the charged offense without anything more.

See United States v. Rounds, 30 M.J. 76 (C.M.A. 1990). Thus, any argument asserting that there was no proof beyond a reasonable doubt because of a fallacy in the prosecution's theory is not necessarily of consequence.

All of the evidence tending to prove appellant's guilt in this case is circumstantial. Nonetheless, when considered as a whole, we conclude that the evidence of appellant's guilt is overwhelming. Appellant had the motive to commit this offense. He was growing increasingly disillusioned with the actions of the victim which he perceived as being a threat to his career. She had performance problems, had been counseled by the command (the same command to which appellant was attached), had recently attempted suicide, and had decided not to reenlist. Things came to a head the morning of her disappearance when both the victim and the appellant were screened by their executive officer for disciplinary action related to the victim's apparent failure to obtain a divorce prior to marrying the appellant. In addition, it was clear that the appellant was upset by the victim's relationship with Yuri despite the fact that he professed to have an open marriage and was involved in a relationship of his own. On the evening of the victim's disappearance, the appellant unexpectedly came home from standing duty early at a time when the victim was out with Yuri. Although there existed a good possibility that appellant's marriage might be capable of being annulled, he appeared anxious to marry his present girlfriend, and they had discussed this possibility.

Appellant contends that no physical evidence exists to link him to this crime. We do not agree. First, a small kitchen towel was found near the victim's body, and the towel was stained with her blood. This towel was identical to two other towels recovered from appellant's home except for the day of the week indicated on the towel (the towel found near the body indicated "Thursday" and the two from appellant's home indicated "Wednesday" and "Friday"). While these towels were not necessarily "one of a kind," they were somewhat unique in that the depicted a mouse sitting on a piece of cheese with the

day of the week indicated in Spanish. It is not difficult to infer that this piece of physical evidence came from the home of the appellant and the victim. The physical injury to the appellant's right hand was an injury which occurred on the same evening as the victim's disappearance and wa an injury for which appellant offered two separate explanations (neither of which the doctor and hospital corpsmen who saw the injury thought was consistent with the injury). One could certainly infer that it was more than a coincidence that appellant suffered an injury to his right hand and the victim suffered bruising and swelling to the left side of her face from behind the car down to the jaw.

Much more evidence implicates the appellant. A crossbow was identified as a possible, if not probable, murder weapon (appellant's own expert forensic pathologist came to this conclusion). The victim and appellant owned a crossbow which was kept in their garage. Not only was the crossbow missing after the murder, the appellant began telling others it was missing before the victim's body was discovered. The appellant presented his girlfriend with a ring in the early morning hours of 10 April, and it was the same ring the victim was seen wearing on the morning of 9 April. The emotional state of appellant was observed by others both before the body was discovered and upon notification of his wife's death suggested that he already knew she was dead. Perhaps the most damning of all evidence, however, were the statements which appellant made to his girlfriend's roommate. These statements included references to his wife dying quickly, the "bolt" from a crossbow not going all the way through the body if fired from a certain range, and an explanation that he had to do it because his wife was ruining his career.

Exactly where the murder took place, what caused the pattern of lividity marks on the back of the victim, or how the victim's body got to the place it was found became unimportant when all of the evidence is considered as a whole. We need not even consider the probability that the trial counsel's theory of the case is correct since our de novo review convinces us beyond a reasonable doubt of appellant's guilt of the offense of which he

was convicted. We likewise conclude that the evidence is legally sufficient to sustain appellant's conviction.

IV

Lastly, we turn to appellant's allegation of ineffective assistance of counsel. The standard for review is whether the trial defense counsel was seriously deficient in representing the appellant and, if so, whether there is a reasonable probability that, but for the deficiency, the outcome of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984). Appellant asserts that certain evidence was not pursued by his counsel at trial including the existence of a blond hair on the fingernail of the victim, the existence of numerous pallets in the countryside near where the body was found which better match the lividity marks on the body than the one recovered from his back yard, and the existence of additional good character evidence. He also complains of his counsel's failure to pursue ballistic evidence on crossbows, failure to seek a change of venue, failure to call him to the stand to testify, and the failure to have a polygraph administered to attest to his truthfulness. The Government responds to these allegations by citing the affidavits provided by trial defense counsel which explain their actions and tactics, including readvising the appellant before the defense case in chief of his right to testify. Apparently appellant changed his mind about both testifying and taking a polygraph since the time of trial. On the question of venue, the Government points to the large number of challenges for cause granted the defense to ensure an impartial panel of members.

We need not decide whether counsel's representation was seriously deficient in this case since we conclude that whether counsel was deficient in any or all of the areas alluded to, or in none at all, it would have had no affect on the outcome of this case. As we noted previously, the evidence of guilt in this case was overwhelming. This is buttressed by the unanimous verdict of the members in finding the appellant guilty of premeditated murder. Calling the appellant to the stand in the defense case in chief would not have affected the outcome since he was

incapable of telling the same story twice or explaining the inconsistencies among the stories he had already told. Additional evidence dealing with crossbows or lividity marks would not have affected the outcome since this evidence was subject to different interpretations and was of little consequence when considering the evidence as a whole. Calling those witnesses identified by the appellant on the issue of his character would not have favorably affected the outcome since none of those witnesses spoke favorably of the appellant when interviewed and many spoke unfavorably of him. The second prong of *Strickland* has not been satisfied, and accordingly, we hold that there was no ineffective assistance of counsel in this case.

V

We have carefully considered the appellant's remaining assignments of error[8] and reject each of them as having no

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[8]I. APPELLANT WAS DENIED HIS RIGHT TO A SPEEDY TRIAL UNDER R.C.M. 707 BECAUSE:

A) THE MILITARY JUDGE ERRONEOUSLY EXCLUDED THE TIME DURING WHICH APPELLANT WAS HELD IN THE NAVY BRIG IN ROTA, SPAIN;

B) THE MILITARY JUDGE ERRONEOUSLY EXCLUDED THE INTERIM BETWEEN ACTUAL DAYS SPENT LITIGATING MOTIONS; AND

C) THE GOVERNMENT SHOULD BE HELD ACCOUNTABLE FOR THE TIME DURING WHICH IT FAILED TO MAKE PROGRESS IN ANALYZING DEFENSE EVIDENCE.

D) THE GOVERNMENT IS RESPONSIBLE FOR THIRTY-THREE DAYS OF THE TIME PERIOD BETWEEN 8 DECEMBER AND 23 JANUARY ALTHOUGH TRIAL DEFENSE COUNSELS FAILED TO RENEW THEIR MOTION FOR DISMISSAL FOR LACK OF SPEEDY TRIAL.

II. APPELLANT WAS DENIED HIS RIGHT TO A SPEEDY TRIAL PURSUANT TO THE 90 DAY RULE CONTAINED IN R.C.M. 707(D).

IV. THE CONVENING AUTHORITY, CAPT J. M. SMITH, USN, WAS AN "ACCUSER" AS DEFINED UNDER ARTICLE 1(9), UCMJ, (10 U.S.C. § 801 (9)), BECAUSE HE HAD A PERSONAL INTEREST IN THE CASE.

V. THE ATTEMPT BY THE CONVENING AUTHORITY TO HAVE PO2 CLAUSSEN, A DEFENSE WITNESS, RELIEVED FOR CAUSE WAS UNLAWFUL COMMAND INFLUENCE.

VIII. APPELLANT WAS DENIED A SPEEDY REVIEW OF HIS COURT-MARTIAL CONVICTION BECAUSE 254 DAYS ELAPSED BETWEEN THE TRIAL AND THE CONVENING AUTHORITY'S ACTION.

IX. THE RECORD OF TRIAL IS NOT VERBATIM AS REQUIRED UNDER R.C.M. 1103 BECAUSE IT LACKS THE SPANISH LANGUAGE TESTIMONY GIVEN THROUGH AN INTERPRETER. [FOOTNOTE OMITTED.]

X. THE MILITARY JUDGE ERRED IN ALLOWING THE CONVENING AUTHORITY TO APPOINT AVIATION STOREKEEPER CHIEF RICHARD W. SWEET AS A MEMBER, RELIEVE HIM, AND THEN APPOINT HIM A SECOND TIME.

XI. THE EIGHT MEMBER COURT-MARTIAL PANEL PROVIDED APPELLANT VIOLATED THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT AND THE SIXTH AMENDMENT TO THE CONSTITUTION, AND WAS OTHERWISE IMPROPER. TWELVE IS THE MINIMUM NUMBER OF PANEL MEMBERS NEEDED TO PRODUCE A FAIR RESULT WHERE AN ACCUSED IS CHARGED WITH A SERIOUS FELONY.

XII. THE MILITARY JUDGE ERRED IN RULING THAT DR. SIBON WAS PROPERLY QUALIFIED UNDER MIL. R. EVID. 702 AS AN EXPERT WITNESS TO TESTIFY THAT THE MEANS OF DEATH WAS A CROSSBOW. [FOOTNOTE OMITTED.]

XIII. LT CHEMA, THE ASSISTANT TRIAL COUNSEL, IMPERMISSIBLY

INFLUENCED WITNESSES PRIOR TO TRIAL WHEN HE TOLD PETTY OFFICER CLAUSSEN AND PETTY OFFICER CARDINALE THAT APPELLANT HAD "BRUTALLY KILLED" HIS WIFE. [FOOTNOTE OMITTED.]

XIV. NIS AGENTS CONDUCTED AN ILLEGAL SEARCH OF APPELLANT'S HOUSE WHEN HE WAS ON LEAVE TO ATTEND HIS WIFE'S FUNERAL. [FOOTNOTE OMITTED.]

XV. APPELLANT WAS BUT A PAWN IN A GAME OF DIPLOMACY AS THE GOVERNMENT PROSECUTED AND CONVICTED HIM NOT BECAUSE OF HIS GUILT, BUT RATHER BECAUSE POLITICAL EXPEDIENCY MANDATED THAT THE CRIME BE PINNED ON AN AMERICAN SERVICE MEMBER. [FOOTNOTE OMITTED.]

XVI. THE NAVAL INVESTIGATIVE SERVICE SUPPRESSED VITAL DEFENSE EVIDENCE AS MASSIVE AMOUNTS OF COCAINE, CODEINE AND ALCOHOL WERE DISCOVERED IN HM2 MCCULLUM'S BODY AND THEY FAILED TO INVESTIGATE THE ORIGIN OF THESE SUBSTANCES. [FOOTNOTE OMITTED.]

XVII. THE GOVERNMENT FAILED TO PROPERLY INVESTIGATE THE CRIME TO DETERMINE THE TRUE CULPRIT. [FOOTNOTE OMITTED.]

XVIII. ON 19 SEPTEMBER THE STAFF JUDGE ADVOCATE ERRONEOUSLY FORWARDED HIS RECOMMENDATION TO THE CONVENING AUTHORITY FOR ACTION WITHOUT WAITING FOR TRIAL DEFENSE COUNSEL'S COMMENT MAKING IT IMPOSSIBLE FOR HIM TO HAVE COMPLIED WITH R.C.M. 1106(d)(4). [FOOTNOTE OMITTED.]

XIX. CDR CARNEY, THE SUBSTITUTE STAFF JUDGE ADVOCATE, FAILED TO COMPLY WITH R.C.M. 1106(f)(1) AND UNIFORM CODE OF MILITARY JUSTICE ARTICLE 60(d). [FOOTNOTE OMITTED.]

XX. IN HIS RECOMMENDATION DATED 19 SEPTEMBER 1988, THE STAFF JUDGE ADVOCATE FAILED TO SPECIFICALLY STATE HIS AGREEMENT OR DISAGREEMENT WITH RESPECT TO THE ALLEGATION OF LEGAL ERRORS RAISED IN MATTERS

merit.[9] The findings and sentence, as approved on review below, are affirmed.

R. A. STRICKLAND

Chief Judge WILLEVER and Senior Judge ORR concur.

KENT A. WILLEVER

JAMES E. ORR

SUBMITTED BY APPELLANT'S TRIAL DEFENSE LAWYER UNDER R.C.M. 1105. [FOOTNOTE OMITTED.]

XXI. THE STAFF JUDGE ADVOCATE SUBMITTED AN INCORRECT RECOMMENDATION TO THE CONVENING AUTHORITY. [FOOTNOTE OMITTED.]

XXII. THE ALMOST FOUR MONTH DELAY BETWEEN THE DATE SENTENCE WAS ADJUDGED AND THE DATE IT WAS ORDERED EXECUTED VIOLATED R.C.M. 1101(a)(2). [FOOTNOTE OMITTED.]

XXIII. THE CONVENING AUTHORITY ERRED TO APPELLANT'S SUBSTANTIAL PREJUDICE BY REPEATEDLY DENYING APPELLANT'S REQUEST FOR INVESTIGATIVE ASSISTANCE. [FOOTNOTE OMITTED.]

XXIV. THE MILITARY JUDGE ERRED TO APPELLANT'S SUBSTANTIAL PREJUDICE BY FAILING TO INSTRUCT THAT A THREE-FOURTHS VOTE WAS REQUIRED ON A MANDATORY LIFE SENTENCE.

[9]We have specifically considered the staff judge advocate's failure to comment on the legal errors asserted by trial defense counsel in his Rule for Courts-Martial 1106 response, and we have concluded that these allegations of error would not have led to a favorable recommendation by the staff judge advocate or corrective action by the convening authority. *See United States v. Hill*, 27 M.J. 293 (C.M.A. 1988).